

JAMES O. BREENE, JR. (ON RECONSIDERATION)

IBLA 78-602

Decided September 11, 1979

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting oil and gas lease offer W 63858.

Reversed and remanded.

James O. Breene, Jr., 38 IBLA 281 (1978), is vacated.

1. Oil and Gas Leases: Applications: Generally – Oil and Gas Leases: Stipulations

Where BLM's decision to reject a noncompetitive lease offer is based upon a report that the findings and conclusions contained in the Management Framework Plan (MFP) for the area show that acceptance of the offer would not be in the public interest because the lease would threaten valuable wildlife, archeological, paleontological, scenic, and recreation values, and it is subsequently revealed that the report relied upon misstated the contents of the MFP, which actually made provision for mineral leasing subject to certain protective stipulations, the decision will be reversed and remanded with instructions to issue the lease with appropriate and reasonable stipulations.

APPEARANCES: C. M. Peterson, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On December 13, 1978, this Board issued its decision in James O. Breene, Jr., 38 IBLA 281 (1978), in which it affirmed a decision by the Wyoming State Office, Bureau of Land Management (BLM), rejecting the noncompetitive over-the-counter oil and gas lease offer

of James O. Breene, Jr. In its decision, BLM had quoted a report by the Casper District Manager <sup>1/</sup> which stated, in part, as follows:

The areas involved in this lease offer are considered to have very high values for wildlife and recreation. The present MFP decision states that Whoopup Creek, which is within the boundaries of the proposed lease area, be given protective status because of archeological, scenic values, and a proposal that this area be designated a natural area. Numerous pictographs are found on the rock canyon walls in Whoopup Creek and marine fossil beds are scattered throughout the area. These are non-renewable resources and if oil and gas exploration is allowed in the lease offer area before further study of these values are undertaken, the Bureau of Land Management would be in direct conflict with the Antiquities Act, National Historical and Preservation Act, the Archeological and Historical Data Conservation Act, and Executive Order 11593. [Emphasis supplied.]

This Board, relying on the representation as to the contents of the Management Framework Plan (MFP) (as did the Chief, Oil and Gas Section, Wyoming State Office), held that BLM's conclusion that the leasing would not be in the public interest because it is incompatible with these values was adequately supported by background data and facts of record. James O. Breene, Jr., supra at 283.

On January 8 and February 27, 1979, Breene filed a petition for reconsideration of this Board's decision, in which he asserted that the background facts and data do not support BLM's refusal to issue the lease, and that BLM had misrepresented the provisions of the MFP. Breene pointed out that this MFP does not contain a proposal that the area in question be designated a natural area; does not state that the area had unusual paleontological values nor recommend that fossil values there be preserved; does recommend that conflicts between oil and gas activities and scenic and surface values and watershed can be mitigated through use of stipulations to restrict development to nonsensitive areas (such as areas which are not steeply sloped); and does indicate that the area is not used by elk. Breene also maintains that adequate protective stipulations can be imposed on the lease to protect sensitive areas. For instance, he points out that archeological stipulations would insure that no development would occur in archaeologically valuable areas, as an investigation by an archeologist would be required at his expense prior to commencing operations on the site.

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<sup>1/</sup> The report actually was authored by the Newcastle Resource Area Manager in the form of a memorandum dated July 19, 1978. However, on July 24, 1978, the District Manager concurred in the memo, signed it, and transmitted it to the Wyoming State Office, which then based its decision on the memo's content. The decision quoted a portion of the memo verbatim.

On the strength of these representations, the Board by Order dated March 26, 1979, set aside its decision in James O. Breene, Jr., supra, and granted Breene's petition for reconsideration.

In its response to Breene's petition, BLM submitted a memorandum from the Casper District Manager, in which he admits that there are "data weaknesses" in the MFP concerning the area in question. He also states that "[r]eference to a 'MFP decision' in IBLA 78-602 is an error." We note that the District Manager was responsible for this error, as it was his report on which the State Office and this Board relied in concluding that background data and facts of record reflected by the MFP supported the conclusion that the offer should be rejected. <sup>2/</sup> While thus apparently admitting that the MFP does not indicate as previously represented, the District Manager now refers to a "URA" which allegedly contains sufficient information to identify Whoopup Canyon and adjacent tracts as a very significant and valuable cultural resource and wildlife habitat area. No copy of this URA or explanation as to its nature was provided.

The District Manager indicates in this response that much of the area is scheduled for an archeological inventory in order to study petroglyphs there, that oil and gas exploration and development would seriously hamper the inventory and analysis process, and that special stipulations would not provide adequate protection to this resource. He also states that the land has been classified in the URA as scenic categories A and B (without explaining the significance of these categories) and asserts that these classifications cannot be maintained if oil and gas development occurs. He states further that there is presently insufficient data concerning wildlife concentration in the area, and that it is impossible to prepare lease stipulations without these data. He notes that the MFP requires only that major earth-moving operations be limited to flat ground or slopes under 40 percent, and that one-third of the lease area would be unsuitable.

As to paleontological values, the District Manager notes that the area is in within identified marine fossil beds and that there is a lack of knowledge of the significance of the beds. Finally, he notes that the MFP does not include a recommendation that the area be considered for designation as a natural area, but that this is now a possibility, and that area planners are considering designating the area as an "Area of Critical Environmental Concern."

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<sup>2/</sup> In the future, BLM should place copies of all documents on which it relies in deciding to reject offers in the administrative record. We note that, but for Breene's having submitted it, we would be unable to determine the contents of this MFP.

We conclude that the facts of record and background data do not support BLM's conclusions that Breene's lease offer must be rejected and that adequate stipulations cannot be adopted to protect the site.

Breene argues that BLM is reluctant to accept his offer because the area surrounding the site has been found to have archeological values, and that such reluctance based on mere suspicion that the site has similar values is unreasonable. However, in its pleading on reconsideration, BLM states instead that its reluctance is based on its belief that oil and gas exploration would hamper the archeological inventory and analysis of the Whoopup Canyon area which is directed by the MFP, and that special stipulations would not offer adequate protection.

[1] While we appreciate BLM's concern about the possibility that petroglyphs will also be found in the lease area, we disagree that stipulations would not effectively protect such items of archeological interest. The typical archeological stipulation forbids development until the lessee, at his own expense, has completed an archeological investigation by an archeologist approved by BLM. With a modicum of effort, BLM can coordinate this investigation with its own inventory and analysis of Whoopup Canyon and so actually facilitate and reduce the expense of its efforts to identify archeological values.

Issuing an oil and gas lease with such a proviso is consistent with the MFP, which states that "[a]ny action that will result in surface disturbance should be authorized only when there is assurance that no major archeological values will be endangered." Moreover, while the MFP provides that Whoopup Canyon "should be retained in public ownership and the lands protected from mineral and/or agricultural entry," this provision does not bar granting a mineral lease there. Rather, it addresses the filing of mining claims and/or desert land entries there, which actions could result in loss of "public ownership." Thus, the MFP does not direct that Whoopup Creek be given "protective status" against mineral leasing due to its possible archeological value, as implied by the District Manager.

In these circumstances, it is appropriate to impose protective stipulations rather than to reject the offer, as the purpose of protecting archeological values may be accomplished adequately by this less stringent alternative. See Neva H. Henderson, 31 IBLA 217, 219-20 (1977); Cecil A. Walker, 26 IBLA 71 (1976); Bill J. Maddox, 17 IBLA 234, 237 (1974).

BLM is also concerned about the vulnerability of the surface to erosion from drilling operations and road building owing to the alleged steepness of the grades there. As appellant points out, the MFP recommends that surface and watershed protection is to be achieved in conjunction with mineral development and approximately two-thirds of the land is level enough to utilize for oil and gas activities.

Thus, BLM's refusal to lease for this reason is unfounded in fact and certainly is not supported by the MFP, which makes contrary findings and recommendations. BLM may protect the land, the larger portion of which appears to be level ground, by invoking stipulations such as the one mentioned in the area MFP disallowing roads or other occupancy on slopes in excess of 40 percent. Additionally, the MFP recommends that BLM "[i]nspect and write special stipulations on those sites needing reclamation work to assure proper reclamation where federal minerals are involved."

As to wildlife, paleontological, and scenic values, we hold that the facts of record and background data are inadequate to support BLM's refusal to issue this lease. BLM's response to Breene's petition contains reference to statements about these values in a "URA," but BLM failed to place this document in the record, so we cannot tell how much weight it deserves. Further, we do not find BLM's representations about what the URA states specific enough to be probative as to the existence of these values.

We afford no weight to the District Manager's conclusory declaration that scenic classifications cannot be maintained if oil and gas development occurs, as BLM submitted no supporting data for this statement. Cartridge Syndicate, 25 IBLA 57 (1976); Carolyn S. Edwards, 14 IBLA 141 (1974). In any event, appellant has submitted a statement by a BLM geologist with the Newcastle Resource Area which suggests that the area's scenic values are not outstanding. Moreover, the MFP expressly provides that conflicts between scenic values and mineral development can be mitigated and scenic values preserved through use of stipulations, and that mineral activities may be allowed even in "excellent" scenic areas. BLM's citation in its decision to an alleged statement in the "MFP decision" that Whoopup Creek be given protective status owing to its scenic value is admittedly incorrect.

As to wildlife values, the MFP states that there are only "marginal elk herds" in the area and that, if use for mineral exploration "is great enough to put pressure on [the area, it] should be managed for other wildlife species and the elk allowed to 'slip out' of the picture." Thus, there appears to be little concern in the MFP about the effect of mineral leasing on the elk population, which the District Manager cited as one of the special wildlife values of the area.

As to paleontological values, the statement by the BLM geologist indicates that no fossils were found within the lease area, according to a U.S. Geological Survey bulletin published in 1963.

The District Manager states that BLM cannot grant this lease because it lacks data about wildlife and paleontological values and so does not know how to protect these values. This policy grants too much deference to what appears to be only a speculative possibility

that these values exist. BLM can and should adopt protective stipulations such as the one used for archeological values, which take into account this lack of information and allow for protection of the area if the extent of these values subsequently appears to be significant, rather than reject the offer on the possibility that there may be some such values there which deserve protection. Neva H. Henderson, supra; Cecil A. Walker, supra; Bill J. Maddox, supra. A standard wildlife stipulation already exists and may be sufficient.

As Breene points out and the District Manager admits, there is no proposal in the MFP to designate the area applied for as a natural area. <sup>3/</sup> The District Manager states in his submission on reconsideration that the Newcastle Area Manager is considering this land for nomination for inclusion in the National Register of Historic Places. We do not find that this justifies rejecting Breene's lease offer.

Further, the statement by Geological Survey that the area does not have high oil and gas potential is not dispositive. The whole concept of the noncompetitive leasing program is to encourage "wildcat" development in order to discover and produce these minerals from previously unknown sources. See Bill J. Maddox, 24 IBLA 147 (1976). As we said in Stanford R. Mahoney, 12 IBLA 281, 286 (1973):

We find the above-quoted reasons for rejection to be unpersuasive. First, the essential concept of prospecting permits is to enable the permittee to seek to discover commercial deposits which are unknown. To pre-judge what the permittee will find if the permit is allowed is to foreclose the possibility that his effort might disclose mineralization which is unknown to the adjudicator. This defeats the basic intent of the statute. Such prejudgment of the result should be applied only in cases where knowledge of the mineralization is so conclusively established that it can be anticipated with near absolute assurance. This is not such a case.

We hold that BLM's decision to reject Breene's offer because granting the lease was contrary to the findings and recommendations in the MFP, not in the public interest, and was incompatible with uses which are worthy of preservation was based upon a misstatement of what the MFP actually contained, and we therefore reverse it. <sup>4/</sup> On remand, BLM is directed, all else being regular, to issue the lease with appropriate and reasonable protective stipulations.

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<sup>3/</sup> The MFP does recommend the establishment of a 1,000-acre "outstanding natural area" in Clifton Gorge, but this is not the area in question.

<sup>4/</sup> We make no finding as to whether the misstatements were deliberate or simply the consequence of careless work.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, and the matter is remanded for further action consistent herewith. Our decision styled James O. Breene, Jr., 38 IBLA 281 (1978), is hereby vacated.

Edward W. Stuebing  
Administrative Judge

I concur.

Douglas E. Henriques  
Administrative Judge

## ADMINISTRATIVE JUDGE THOMPSON CONCURRING SPECIALLY:

I agree that the prior decision of the Board in this case should be vacated and the case remanded to the Bureau of Land Management (BLM) for further appropriate consideration. With the cooperation of the offeror, BLM in considering appropriate stipulations to protect the archaeological, scenic, wildlife and other values, may wish to consider a stipulated agreement which may bar surface use and disturbance unless and until the appropriate inventories and studies are made which might warrant changes to permit surface use under protective conditions. Such an approach would tend to assuage BLM's concern that oil and gas activities should not be allowed until all appropriate data on the archaeological and wildlife values is known and can be appropriately evaluated and protected by specific stipulations. Appellant is also protected because he will obtain a lease, his offer will not be rejected and thus he will avoid the possibility that he could not get a lease in the future if BLM were to determine that leasing could be allowed with certain stipulations.

Joan B. Thompson  
Administrative Judge



